No. 3069.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC COAST CASUALTY COMPANY (a Corporation),

Appellant,

vs.

S. G. HARVEY,

Appellee.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE.

Appellant is surety on a *supersedeas* bond whereby proceedings were stayed on the decree of this Court in *Harvey* v. *Stowe,* 219 Fed., 17, pending a further appeal to the Supreme Court by Stowe, resulting in an affirmance against him (*Stowe* v. *Harvey,* 241 U. S., 199).

As stated in appellant's brief, the entire claim which appellant has been ordered to allow in favor of appellee, was incurred prior to the giving of the bond, being in fact the amount of pecuniary relief awarded to appellee by the decree of this Court in *Harvey* v. *Stowe, supra.* It happens that the indebtedness arises entirely

out of costs expended by appellee in the District Court and on her appeal to this Court—a circumstance which is immaterial in holding the surety liable on the *supersedeas* bond. The liability was upon a decree "for money not otherwise secured" at the time the bond was given, so that the basis of the claim ceased to be material after it became merged in the judgment.

Appellant here seeks to avoid liability on the bond, claiming:

1. That it was not a *supersedeas* bond.

2. That it was exacted "as a condition of allowing an appeal," contrary to the Bankruptcy Act.

The assignments of error and the argument of counsel's brief are reducible to one principal issue, viz.: Was the bond a *supersedeas* bond?

To answer this question in the affirmative, it is hardly necessary to present argument—the record alone settles the point.

THE BOND WAS AN EFFECTIVE SUPERSEDEAS BOND.

Appellant makes no claim that the instrument was in any way defective in form as a *supersedeas* bond, inasmuch as it is conditioned in the exact language of R. S. Sec. 1000, specified for such an undertaking, and could answer no other purpose than a *supersedeas*. The claim is that it was not a *supersedeas* bond because there was nothing to supersede.

At the time the bond was approved and filed the pertinent facts were as follows:

(1) This Court had entered a decree in *Harvey* v. *Stowe,* 219 Fed., 17, reversing the decree of the District Court with costs in the court below in favor of appellant (Harvey), with directions to the District Court to dismiss the cause and further for costs in this Court and that appellant (Harvey) have execution therefor (Tr., p. 22).

(2) The Clerk of the District Court held in his custody (in part lieu of a *supersedeas* bond on appeal from the District Court), 546 shares of corporate stock belonging to Mrs. Harvey, which were the subject-matter of the litigation (Tr., p. 25).

As a consequence of the stay of proceedings which was procured by this bond on further appeal to the Supreme Court, appellee herein was deprived of the possession of her stock from November 18, 1914, to July 11, 1916, and for the same period prevented from procuring a dismissal of the action against her and from collecting her already accrued costs, awarded her by the decree of this Court.

Appellant's contention that in the above there was nothing to supersede, is mere subterfuge.

Under circumstances completely analogous to the above, the Supreme Court holds that a *supersedeas* bond is operative and sufficient: In a suit in the nature of trustee process, brought in the District of

Columbia, a receiver was appointed who had in his hands $25,000 in bonds, when the Supreme Court of the District ordered the bill dismissed. An appeal to the United States Supreme Court, with *supersedeas,* was taken. Appellant, fearing that this was insufficient, moved for a special writ of *supersedeas.* In denying the motion as being unnecessary, Waite, C. J., says:

> "A *supersedeas* upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. When this appeal was taken, the only execution there could be of the decree below was the collection of the costs and the delivery to the defendant of the fund in court, which is the subject-matter of the litigation. To that end, a further order of the court was asked; but such an order would be in aid of the execution of the decree which has been stayed, and consequently beyond the power of the court to make until the appeal is disposed of. While the court below may make the necessary orders to preserve the fund, and direct its receiver to that extent, it cannot place the money beyond the control of any decree that may be made here, for that would be to defeat our jurisdiction.
>
> "A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him;"
>
> *Goddard* v. *Ordway,* 94 U. S., 672-3.

Counsel for appellant reiterate the argument that there could be no *supersedeas* because there was no judgment upon which execution could be issued. In this counsel are in error, as the decree of this Court specifically awarded both costs and execution, and had no appeal been taken to the Supreme Court, costs in this Court would have been taxed in this Court.

The specific award of execution for costs is, however, only a part of the execution of the judgment. Counsel confuse the technical "writ of execution" with the general term "execution" which signifies not merely the writ, but any means whereby a judgment or decree is carried into effect.

National Foundry etc. Works v. *Oconto Water Co.*, 52 Fed., 43, 55.

In the opinion just cited it is pointed out that many decrees in equity are self-executing. The decree of this Court in *Harvey* v. *Stowe, supra,* partook largely of this self-executing character, in that the main relief, i. e. the release of Mrs. Harvey's impounded stock, followed automatically from the decree of dismissal. The facts involved in *Goddard* v. *Ordway, supra,* were of precisely the same character.

The term *supersedeas* has likewise two uses. In its narrower sense it signifies a writ specifically staying a proceeding at law. In its more general sense it includes any act or procedure which has the effect *proprio vigore,* of suspending or staying proceedings whether at law or in equity. In particular it is applied to the statutory procedure, ancillary to appeals and writs of error, whereby the power of the lower court to carry into effect the judgment is suspended pending the decision of the appellate court.

Williams v. *Bruffy,* 102 U. S., 249;

Dulin v. *Pacific Wood etc. Co.*, 98 Cal., 304, 306;
37 *Cyc.*, 597;
3 *C. J.*, 1272.

Had counsel quoted further from *Hovey* v. *McDonald*, 109 U. S., 150, this distinction would have been apparent—pages 160-1.

It is also wholly unimportant that appellee's costs had not been taxed at the time the bond was given. They had all been incurred and fell within the maxim, *Id certum est quod certum reddi potest.* Their taxation was a mere formality, but was one of the very proceedings stayed by the bond on which this appellant was surety.

Counsel's argument that there was no judgment upon which execution could issue is therefore both incorrect in its premises of fact, and fallacious in its deductions of law.

THE BOND WAS NOT EXACTED AS A CONDITION OF ALLOWING THE APPEAL, BUT SOLELY AS A CONDITION OF GRANTING A SUPERSEDEAS.

Counsel for appellant strive to create in the mind of the Court the impression that the bond filed in the appeal of *Stowe* v. *Harvey*, 241 U. S., 199, was exacted as a condition precedent to allowing the appeal. To this end the statements in appellant's brief do not correctly represent the record in at least two particulars:

Appellant's Brief.

"We have then a plain provision of the statute which confers upon Trustees in Bankruptcy the right to take an appeal without giving a bond to cover costs. In the instant case the judge who allowed our appeal *made his order requiring that a bond in the sum of five thousand dollars ($5000.00) be given, and that the bond operate as a supersedeas.* The making of that order, however, cannot have the effect of limiting the rights of the Trustee in Bankruptcy. It was an order which violated the terms of the statute and imposed upon the Trustee an involuntary burden which the court had no right to impose" (Brief, pp. 5-6).

"Specifications of Error."

"1. The order allowing the claim of Mrs. Harvey against the Receiver of the Pacific Coast Casualty Company is erroneous for the reason that Section 25c of the Bankruptcy Act provides that Trustees in Bankruptcy shall not be required to give bond when they take appeals or sue out writs of error. Consequently, the order requiring the Trustees in Bankruptcy to give bond *as a condition to allowing his appeal* was in contravention of the statute, and the bond given in pursuance of that order is without consideration and void" (Brief, pp. 3-4).

Transcript of Record.

"Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Supersedeas Bond.

"The foregoing petition for appeal is hereby granted and it is hereby ordered that the appeal in the above-entitled cause to the Supreme Court of the United States be and the same is hereby allowed as prayed, *also ordered that this shall operate as a supersedeas upon the petitioner filing a bond* in the sum of five thousand ($5,000) dollars.

"Dated: December 14, 1914.

"(Signed)

"Wm. C. Van Fleet,

"United States *Circuit* Court Judge, Ninth Circuit."

(Tr., pp. 27-28.)

"Assignment of Errors on Appeal."

"1. That the bond given by Pacific Coast Casualty Company was given in a case prosecuted by B. S. Stowe, complainant, in his capacity as Trustee in Bankruptcy of the Estate of J. Downey Harvey, a bankrupt, and that under the provisions of section 25c of the Bankruptcy Act said trustee had the right to prosecute said litigation without rendering a bond and that the order of Court requiring said bond to be given *as an incident to taking said appeal* was made without right and that said bond given in pursuance thereof is without consideration and void" (Tr., pp. 33-34).

To take an appeal is one thing and to obtain a *supersedeas* pending appeal is an ancillary but entirely separate proceeding.

The failure of an appellant to supersede or stay proceedings on a judgment or decree against him in in no way limits the power of the appellate court to review the proceedings.

> *Logan* v. *Goodwin*, 104 Fed., 494;
> *Rederaktiebolaget Amie* v. *Universal Transp. Co.*, 245 Fed., 282.

Upon reversal of an executed judgment, the appellate court has power to order and to compel restitution.

> *Foster Federal Procedure*, §712, p. 2561.

Accordingly, Stowe, in prosecuting his appeal to the Supreme Court, could have prosecuted his appeal without giving any bond for costs on appeal, by virtue of the exemption in §25c of the Bankruptcy Act.

The order of the learned District Judge who allowed the appeal specifically so provided—the allowance was unconditional and without bond. The fixing of the amount of the *supersedeas* bond was embraced in a subsequent and independent provision of the order. The privilege of a *supersedeas* was to be availed of or not at the option of Stowe. He elected to take the *supersedeas,* with the results above stated as regards this appellee.

Appellant in this case now attempts to make it appear that the bond in question was not a *supersedeas* bond, but was a bond for costs on appeal, exacted *colore officii* contrary to statute "as a condition to allowing appeal."

The extent to which the record must be distorted to lend color to the foregoing argument is obvious. Appellant's contention that the bond was unlawfully exacted is entirely without foundation in the record. The extent to which the bond was necessary as and operated as a *supersedeas,* has already been stated under the first heading of this brief.

THE FACT THAT APPELLEE'S CLAIM AROSE SOLELY OUT OF COSTS IS IMMATERIAL IN FIXING THE LIABILITY OF THE SURETY.

As stated, the claim of appellee, allowed against appellant surety had its origin in costs.

These costs, however, being merged in the decree of this Court and the order of dismissal entered in the District Court pursuant thereto, no collateral inquiry will be permitted in this proceeding as to the basis of that decree.

The bond recites the rendition and entry of the decree of this Court in *Harvey* v. *Stowe* (Tr., p. 11), The obligors are consequently estopped in a proceeding against them to question collaterally that decree. even on jurisdictional grounds (except where constitutional rights are involved).

Dexter-Horton v. *Sayward,* 84 Fed., 296.

A judgment is an entirety, whether it be for debt, for tort, and whether or not there be included therein costs as incidental thereto.

Church v. *Hay,* 93 Ind., 323;
Wilson v. *Williams,* 68 Atl., 598;
11 *Cyc.,* 261.

A *supersedeas* bond covers any *"money not otherwise secured"* awarded by the judgment or decree appealed from, as well as costs and damages on appeal.

U. S. Supreme Court Rule 29;
C. C. A. Rule 13;
American Surety Co. v. *North Packing Co.,* 178 Fed., 810;
Rosenstein v. *Tarr,* 51 Fed., 368, 370;
Tarr v. *Rosenstein,* 53 Fed., 112;
Davis v. *Patrick,* 57 Fed., 909; 911;
Wood v. *Brown,* 104 Fed., 203, 206;
Pease v. *Rathbun-Jones Eng. Co.,* 228 Fed., 273, 277-8.

In *Surety Co.* v. *Packing Co., supra,* the decree appealed from was for costs only, in favor of the defendant, to the amount of $1087.35. This was affirmed on appeal, where additional costs of $20 were taxed, to which $5 was added as costs after mandate in the lower court. In a suit on a *supersedeas* bond, the surety company claimed that it was liable only for the $25 costs accruing after appeal. *Held,* and

affirmed by the Circuit Court of Appeals, that the bond operated to stay execution for the costs below and that the surety was liable for them as being "a judgment for money not otherwise secured."

American Surety Co. v. *North Packing Co.*, 178 Fed., 810.

The only difference between that case and this is, that here no costs on appeal to the Supreme Court or after mandate are included. To seek such additional costs might raise a question under the Bankruptcy Act which need not be imported into this case.

By way of authority to support its contentions, appellant has selected two classes of cases constituting exceptions to the general rule of *supersedeas:*

(1) *Kountze* v. *Omaha Hotel Co.*, 107 U. S., 378, deals with the foreclosure of a mortgage. Consequently the judgment was not "for money not otherwise secured" and a *supersedeas* bond in the ordinary form does not secure the amount of the debt found due by the decree, nor the costs of the original suit *which were a part of the decree.*

(2) In *Green Bay Co.* v. *Norrie*, 128 Fed., 896, an injunction had been issued. An appeal was taken with *supersedeas.* Pending the appeal the injunction was violated, although of course the injunction was not suspended by the *supersedeas,* the continuance, suspension or modification of an injunction pend-

ing an appeal being a matter of discretion with the judge granting the same (Equity Rule 74; *Foster Federal Procedure,* §703, p. 2488). *Held,* that damages for violation of the injunction were not covered by the *supersedeas* bond, this being a collateral matter, punishable as a contempt.

Distinguishing *Kountze* v. *Hotel Co.,* the Circuit Court of Appeals for the Fifth Circuit says:

> ". . . The bond in question was conditioned as required by the quoted provision of the statute. The decree which was so superseded was one for the payment of money. The breach of the condition of such a bond given in such a case entitles the obligee to recover, not only compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. *American Surety Co. of New York* v. *North Packing & Provision Co.,* 178 Fed., 810; *Wood* v. *Brown,* 104 Fed., 203. The ruling made in the case of *Kountze* v. *Omaha Hotel Co.,* 107 U. S., 378, is not applicable here. The bond under consideration in that case was given on an appeal from an ordinary foreclosure decree. It was distinctly pointed out in the opinion rendered in that case (107 U. S., 393) that the decree appealed from was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending. Not so here, where the effect of the bond under consideration was to supersede the decree as a whole, not merely the part of it which decreed a sale of the property found to be subject to a lien, but the part of it which ordered the payment of money by the appellant to the appellee.
>
> "Nothing contained in rule 13 of this court can be given such effect as to prevent the bond standing as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured."

Pease v. *Rathbun-Jones Eng. Co.,* 228 Fed., 273, 278.

cf. to the same effect

Fidelity & Deposit Co. v. *Expanded Metal Co.*, 183 Fed., 586;
Woodworth v. *Mutual Life Ins. Co.*, 185 U. S., 354, 362.

Notwithstanding the fundamental difference between judgments for moneys secured and for moneys not secured with relation to *supersedeas,* and the repeated decisions pointing out the distinction, counsel for appellant say that *Kountze* v. *Hotel Co.* is "a case identical in principle, with that presented on this appeal" (Brief, p. 7).

The only relevancy of the Kountze case is to emphasize the rule that a judgment is an entirety as to costs and any other relief awarded. If the main relief is otherwise secured, the costs below are likewise covered by the same security and are not covered by a *supersedeas* bond. Conversely, a *supersedeas* bond covers the amount of unsecured money awarded by the judgment or decree, including costs, or for costs alone if no other money be awarded.

Am. Surety Co. v. *North Packing Co., supra.*

This appellee seeks to recover on "a judgment for money not otherwise secured" and it matters not whether the basis of the judgment is debt, damages, interest or costs, or all four together. The bond here operated as a *supersedeas* of such judgment and appellee is entitled to recover.

BANKRUPTCY ACT 25c EXEMPTS A TRUSTEE FROM GIVING A BOND FOR COSTS ON APPEAL BUT NOT FROM GIVING SECURITY WHEN HE OBTAINS A SUPERSEDEAS.

Counsel for appellant say that "apparently" the section referred to dispenses with a *supersedeas* bond on the part of a trustee in bankruptcy.

This point they do not argue, possibly because their assignments of error do not raise the question, or possibly because there is no tenable ground to support the argument.

As the suggestion involves the construction of a statute, the Court is at liberty to consider it notwithstanding its not being assigned as error, and we shall therefore refer to it briefly.

If there is any point in the suggestion, it is remarkable that in twenty years no such judicial construction has been placed on the statute. If such has been the practice, it is even more surprising that the learned judge of the District Court should have made the order as he did, allowing the appeal unconditionally and superadding the conditional order for *supersedeas*, and that experienced counsel here appearing specially for appellant should have complied without raising the question.

Brief comparison of the statutes is however sufficient to remove any doubt as to construction:

R. S. §1000 makes general provision for the taking of security on appeal, for costs and damages or for

costs only, according as a *supersedeas* is or is not procured.

R. S. §1001 exempts the United States or any Department of the Government, in the most explicit terms, from the necessity of giving either cost or *supersedeas* bonds. A comparison of this section with the Bankruptcy provision demonstrates that not even by the most liberal construction can the same effect be given it:

Revised Statutes.

"Sec. 1001. Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court, either by the United States or by direction of any Department of the Government, *no bond, obligation, or security shall be required* from the United States, or from any party acting under the direction aforesaid, *either to prosecute said suit, or to answer in damages or costs.* In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the Department under whose directions the proceedings were instituted."

Bankruptcy Act.

"Sec. 25c. Trustees shall not be required to give bond *when they take appeals or sue out writs of error.*"

Section 25c has been only once the subject of judicial construction so far as we can discover. The case

came up on motion that a cost and injunction bond be required from a trustee in bankruptcy. The moving party argued that as the section dispenses with cost bonds on appeal, by inference it requires bonds to be given in all other cases. *Held,* that as this statute was an exception to the general rule of R. S. §1000, it was not to be extended beyond its plain terms, and that to all cases not covered by the Bankruptcy Act, the general law applies.

In re Barrett, 132 Fed., 362, 368-9.

The Court in its opinion instances other provisions of the Act referring to involuntary bankruptcies, which are not extended by construction to voluntary cases.

The "taking of an appeal" is defined:

> "This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance) the appeal bond and the citation."

Credit Co. v. *Ark. Cent. Ry.*, 128 U. S., 258, 261.

A trustee in bankruptcy would be excused from filing the appeal bond. But should he desire to procure a *supersedeas,* in addition to his appeal, he is under the same obligations as any other civil litigant, and the judge authorizing the *supersedeas* is bound to require security under R. S. 1000, 1007, and the Court Rules, exactly as in other cases.

An effort has been made for example to extend

the terms of R. S. §1001 to receivers of national banks. *Held,* that the section would not be so extended unless the receiver was acting at the direction of the Comptroller of Currency, and the funds of the Treasury Department made answerable for costs.

Platt v. *Adriance,* 90 Fed., 772.

A trustee in bankruptcy is merely an appointee of the creditors. He is much less a public official than is the receiver of a national bank.

If §25c is to be construed in this case, it is plain that its provisions cannot be so extended as to exempt a trustee in bankruptcy from giving a bond where he procures a *supersedeas.*

THE INCLUSION OF A SUPERFLUOUS PROVISION DOES NOT VITIATE THE ENTIRE BOND.

Appellant apparently intends to argue that the entire bond was vitiated because by its terms it was security for costs as well as damages.

Even if it be conceded that the conditions of the bond were excessive in this regard, no such enforcement is sought, and these will be rejected as surplusage and the bond held good insofar as it complies with the statute and the rules of court.

U. S. v. *Bradley,* 10 Pet., 343, 363-4;
D. C. v. *Waggeman,* 15 D. C., 328, 337.

It is not necessary here to construe the statute as to the form of *supersedeas* bond required. The "costs"

secured may be construed as referring only to accrued costs merged in the judgment appealed from. The proper construction may be that a trustee procuring *supersedeas* must incidentally waive his exemption from giving security for costs on appeal, because of the express terms of R. S. §1000 specifying both damages and costs. This however is pure speculation.

The bond here in question was conditioned as required by R. S. §1000 for a *supersedeas* bond. No recovery is sought under it except for the amount of money otherwise unsecured awarded by the decree superseded.

AN ACTUAL STAY OF PROCEEDINGS HAVING BEEN EFFECTED BY THE BOND, THERE IS FULL CONSIDERATION, AND IT IS GOOD AS A COMMON LAW OBLIGATION. FURTHERMORE, THE OBLIGORS ARE NOW ESTOPPED TO QUESTION ITS VALIDITY.

There is no question but that the bond here in question was obtained by Stowe and was accepted and acquiesced in by Mrs. Harvey as being a valid and sufficient *supersedeas* bond. There is also no question that it operated effectively as such *supersedeas* from November, 1914, to July, 1916. Under these circumstances, it cannot be avoided for want of consideration.

The first principle upon which obligors are prevented under the above circumstances from questioning the validity of the bond is that of estoppel:

> "Concede that the undertaking did not operate to legally stay proceedings upon the judgment, (a point which we do not decide,) yet it in fact had that effect, and the appel-

lants received all the benefit for which their sureties contracted and were they allowed now to say that their undertaking was *nudum pactum*, gross injustice might be done to the plaintiff because he did not choose to act upon a doubtful right."

Hathaway v. *Davis*, 33 Cal., 161, 169;
Duncan v. *Thomas*, 69 Pac., 310, 311;
Portis v. *Illinois Surety Co.*, 176 Ill. App., 590;
Granger v. *Parker*, 142 Mass., 186;
Lauder v. *Heley*, 141 N. W., 201;
Pratt v. *Gilbert*, 29 Pac., 965.

In many other jurisdictions such bonds are held valid as common-law obligations supported by a sufficient consideration without specific reliance upon the principle of estoppel.

Goodwin v. *Bunzl*, 102 N. Y., 224;
Dore v. *Covey*, 13 Cal., 502, 508;
Hester v. *Keith*, 1 Ala., 316, 319;
Tanquary v. *Bashor*, 42 Colo., 231; 94 Pac., 22;
Mix v. *People*, 86 Ill., 329;
Buchanan v. *Milligan*, 125 Ind., 332; 25 N. E., 349;
Gille v. *Emmons*, 61 Kan., 217; 59 Pac., 338;
Stephens v. *Miller*, 80 Ky., 47;
Healy v. *Newton*, 96 Mich., 228; 55 N. W., 668;
English v. *Smith*, 1 Neb., 670; 96 N. W., 60;
Comron v. *Standland*, 103 N. C., 209; 9 S. E., 317;

Braithwaite v. *Jordan,* 5 N. D., 196; 65 N. W., 701;

Bulkley v. *Stephens,* 29 Oh. St., 620;

Coughran v. *Sundback,* 13 S. D., 115; 82 N. W., 507;

Bortree v. *Dunkin,* 20 Wyo., 376; 123 Pac., 913.

It is submitted that the order of the District Court directing the receiver of the surety company to allow the claim upon the bond was correct and should be affirmed.

Respectfully.

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